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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Federal-State Joint Board on
Universal Service

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CC Docket No. 96-45

To: The Commission

SUPPLEMENT TO PETITION FOR RECONSIDERATION

Teletouch Licenses, Inc. (TLI), pursuant to Section 1.429(d) of the Commission's Rules, hereby supplements its timely filed July 17, 1997 Petition for Reconsideration (the Petition) of the Commission's Report and Order (the Order) in the above-captioned proceeding. TLI believes that (i) the Commission's recent determination that an interconnected paging service is interstate in nature is contrary to Section 2(b) of the Communications Act of 1934, as amended (the Act), and therefore is discriminatory; and (ii) the Commission's requirement that all carriers utilize gross billed revenues rather than collected revenues for purposes of calculating universal service contributions is inequitable and violative of Section 254(d) of the Act. Accordingly, TLI urges the Commission to reconsider the its determination.

In support thereof, the following is shown:

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I. The Common Carrier Bureau's Definition of Interstate Paging Service is Contrary to Section 2(b)(2) and (b)(3) of the Act.

During a hastily convened "eleventh hour" meeting between members of the wireless communications industry and the staff of the Commission's Common Carrier Bureau (the Bureau) on Friday, August 29, 1997, the Bureau's staff stated that a paging carrier would be considered an interstate carrier if (i) its paging system was interconnected to the public switched telephone network (PSTN) and (ii) inbound interstate calls were not blocked. The industry explained that paging carriers have no control over the communication, except for that portion of the communication between the paging terminal and the paging transmitter, which in many instances, are located in the same state. And, with the exception of large regional and the relatively few nationwide paging systems, most paging has historically been local in nature. See Mobile Radio Service, 93 FCC Rcd. 908, 920 (1983).

The staff stated that its definition would apply to all paging carriers even though, like the local exchange carrier, the paging carrier receives no compensation for the incoming interstate component of the communication, (ii) the interstate component of the communication is carried by an unaffiliated interexchange carrier, (iii) the unaffiliated carrier receives separate end-user compensation for the communication by the caller, and (iv) the interexchange carrier will report the end-user interstate revenues for the interstate component of the communication on its own Form 457 Universal Service Worksheet,¹ and

¹ The relationship between the paging carrier and the local exchange carrier is that of a connecting carrier, much like the local exchange carrier is a connecting carrier to the interexchange carrier. And like the paging carrier, the local exchange carrier receives no end-user revenues from the interstate component of the communication. As such, Section 2(b) of the Act specifically preserves the intrastate nature of local exchange carriers and exempts them from regulation as interstate carriers by mere virtue of their interconnection with an interexchange carrier.

(v) the portion of the communication between the paging carrier's paging terminal and the subscriber's paging receiver is intrastate. As such, the Bureau's determination is discriminatory and contrary to Sections 2(b) and 254(d) of the Act.

Section 2(b) provides in pertinent part, as follow:

Except as provided in Sections 223 through 227, inclusive, and Section 332 and subject to the provisions of Section 301 and Title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . (2) any carrier engaged in interstate or foreign communication solely through physical interconnection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), or another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . (underlining added).

Section 254(d) provides in pertinent part as follows:

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. (underlining added).

It is clear from a plain reading of Section 2(b) of the Act that the Bureau's determination that interconnection with the PSTN, in and of itself, creates an interstate carrier is misplaced. Rather, to the contrary, Congress has unequivocally stated that "physical interconnection with the facilities of another carrier" will not serve as a means to make an otherwise intrastate carrier interstate in nature. To do so, under the Bureau's definition, would convert (i) a paging carrier whose service area is limited to Hawaii or central Texas into an interstate carrier by virtue of interconnection with the PSTN, or (ii) a local exchange carrier by virtue of its interconnection to the long distance carriers, into an interstate carrier even though the local exchange carrier does not handle or otherwise receive end-user compensation for the interstate component of the interLata call. Further, unlike the

local exchange carrier, the paging carrier does not provide access to the long distance network.

Local exchange carriers are classified as intrastate carriers under Section 2(b) of the Act, and the Bureau has properly taken no steps to change this classification for universal service purposes. Accordingly, the Bureau's treatment of interconnected paging carriers and other types of connecting carriers is discriminatory and arbitrary and capricious, in violation of Sections 2(b) and 254(d) of the Act. See Green Country Mobilephone, Inc. v. FCC, 765 F. 2d 235 (D.C. Cir. 1985) (similarly situated parties must be treated the same).

In Iowa Utilities Board v. FCC, ___ F.3d ___ (8th Cir. 1997), the Court stated that "Section 2(b) [of the Act] provides that 'nothing in this chapter shall be construed to apply or give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service. Id. at _____. See also California v. FCC, ___ F.3d ___ (8th Cir. 1997). In citing Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 377 (1986), the Eight Circuit noted that the Supreme Court had emphasized that Section 2(b) of the Act constitutes "an explicit congressional denial of power to the FCC" and that Congress can override the exclusionary provisions of Section 2(b) of the Act by "unambiguously granting the FCC authority over intrastate telecommunications or by directly modifying Section 2(b) of the Act. Id. at ___, citing Louisiana at 377.

In that Congress (i) limited Section 254(d) to interstate carriers, and (ii) did not explicitly exempt universal service from the ambit of Section 2(b) of the Act in order to bring intrastate telecommunications under the purview of the federal universal service program, Section 2(b) of the Act remains in effect, and the communications described in

Section 2(b)(2) and (b)(3) are intrastate, and beyond the reach of the federal universal service program. Accordingly, the Bureau's definition of interstate paging is arbitrary and capricious and contrary to Sections 2(b) and 254(d) of the Act.

II. The Common Carrier Bureaus' Requirement that Carriers Use Gross Billed Revenues When Completing the Form 457 Universal Service Worksheet is Inequitable and Contrary to Section 254(d) of the Act.

On August 11, 1997, the Commission released its final Public Notice (DA 97-1671A) wherein it provided corrected explanatory instructions for preparation of the Form 457 Universal Service Worksheet. In its instructions, the FCC announced, for the first time, that end-user revenues would be based upon billed revenues rather than collected revenues. The Bureau's staff stated that this definition would apply to all carriers, even though wireless revenues are generally calculated for tax and other purposes on a cash-receipt basis, as opposed to the accrual basis now demanded by the Commission's staff for purposes of the Universal Service Fund (USF).²

The Commission's action will require much of the paging industry to change its method of accounting at mid-year. The Commission does not have the statutory authority to require paging carriers to change their method of accounting at any time. Even if the Commission had such authority, it has not conducted any rulemaking proceedings to adopt rules to implement it. Therefore, the Commission's attempt to force paging carriers to convert to accrual accounting is beyond the scope of the Communications Act and the

² Under cash-basis accounting, revenues are received upon receipt of payment, while under accrual-basis accounting, revenues are received when invoiced. The differences between these accounting methods can be significant, and as a result, the election of one method over the other could have a significant impact on other federally mandated filings, including those to the Securities Exchange Commission and the Internal Revenue Service.

Commission's Rules. Further the imposition of the accounting change specified in the FCC Form 457 Universal Service Worksheet will have an inequitable impact on USF contributions, in violation of the mandate of Section 254(d) of the Act. Section 254(d) of the Act requires that USF contributions be made on an equitable basis. That carriers must make a portion of their payments on the basis of revenues that will never be received will have a disparate impact in that different components of the telecommunications industry, and even similar carriers in different parts of the country, have substantially different percentages of uncollectible invoices. Thus, if one carrier experiences a 25 percent uncollectible rate while another carrier in a less economically depressed area only experiences a five percent uncollectible rate, the impact of the USF contribution on the first carrier is far more severe since he is still being required to make a contribution based upon the 25 percent of his uncollectible revenue.³ As a result, the impact of any USF contribution that is based on gross invoices may have a significantly different effect from carrier-to-carrier, and thus, violates the equitable and non-discriminatory mandate of Section 254(d) of the Act. In order to rectify this situation, TLI urges the Commission to utilize actual receipts as the basis for calculating USF contributions. In this way, all carriers should be similarly affected since the "uncollectible" variable will have been eliminated.

³ While the Commission's staff stated that gross billed revenues did not include fraudulent charges, it stated that uncollectible invoices must nonetheless be included as gross billed revenues. Because most telecommunications services are provided pursuant to an agreement wherein the subscriber agrees to pay for the service upon being invoiced, TLI submits that the non-payment of a proper billing should be characterized as fraud for purposes of USF contributions. Like fraud, the carriers have provided a service to the end-user, but in many such instances service has been obtained from the carrier through false pretenses because the subscriber has no intention of making payment.

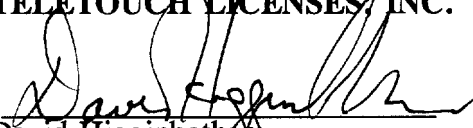
Conclusion

For the reasons described above, it is requested that the Commission reconsider its action.

Respectfully submitted,

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By


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